the register and takes them out, the cases unanimously hold that he commits larceny.[9] The situation presented in the case of Commonwealth v. Ryan[10] brings out in an exceptionally clear manner the distinction between place of concealment and place of ultimate deposit, and at the same time emphasizes the necessity of an unequivocal act transfering possession to the master, thereby terminating the servant's power and control over the thing. In that case the clerk feloniously withdrew from the money drawer of a cash register money which he had placed there a moment before without registering the sale of the article by closing the cash drawer. The open drawer was, in short, a sort of temporary place of concealment. And as the clerk had not in that case, as he probably had in the principal case, performed the unequivocal act of closing the cash drawer the coins had not arrived at their ultimate destination. The taking in the Ryan case was therefore held to be embezzlement, and it would seem equally clear that the taking in the principal case should have been held to be larceny, unless section 508 of the Penal Code can be interpreted as changing the general rule, by making every misappropriation by a servant embezzlement, which hardly seems the proper construction to place upon that section.[11]

H. A. J.

DAMAGES: LIQUIDATED DAMAGES OR PENALTY.—The effect of a provision in a contract for stipulated damages being held a "penalty" is to limit recovery to actual damages.[1] This technical connotation attached to the word penalty, was a result of equity's relief against a penalty bond, where the sum stipulated was construed as mere security for the actual damage.[2] Equity proceeded upon the principle that the parties cannot, by express stipulation, agree upon more than a just compensation.[3]

Whether the parties intended the sum as a bona fide pre-estimate of damages—that is, liquidated damages—or merely a security for a possible breach, is a question primarily of intent to be gathered from all the circumstances of the case.[4] But the express intent of the parties is not conclusive, and the words "penalty" or

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[9] Supra, n. 8, 9, and 10; Bazeley's Case, supra, n. 10; Rex v. Hammon (1812), 4 Taunt. 304, 2 Leach 1083, 128 Eng. Rep. Repr. 346; Walker v. Commonwealth (1837), 8 Leigh (Va.) 743.

[10] Supra, n. 4.

[11] Supra, n. 2.

[1] Dunlop Tyre Co. v. New Garage etc. Co. (1914), L. R. (1915), A. C. 79; Muldoon v. Lynch (1885), 66 Cal. 536, 6 Pac. 417.

[2] Benson v. Gibson (1746), 3 Atk. 395, 26 Eng. Rep. Repr. 1027; Sloman v. Walter (1783), 1 Brown Ch. 418, 28 Eng. Rep. Repr. 1213.

[3] Myer v. Hart (1879), 40 Mich. 517, 523; 1 Sedgwick, Damages (9th ed.), § 407.

[4] Streeter v. Rush (1864), 25 Cal. 68, 71; Nakagawa v. Okamota (1913), 164 Cal. 718, 130 Pac. 707; Sloman v. Walter, supra, n. 2; Sedgwick, Damages (9th ed.), § 406.

"liquidated damages" afford only prima facie evidence of intent.[5] It is obvious that if the stipulated sum is largely disproportionate to any reasonable idea of actual damage, it will be held to be a penalty.[6] But if the sum appears reasonable, the court applies a number of other tests.[7] At common law, the fact that damages were difficult of ascertainment was good evidence that the parties intended liquidated damages and not a penalty.[8] The California Civil Code requires that liquidated damages may be fixed if it "be impracticable or extremely difficult to fix the actual damage," and the courts have strictly construed this provision.[9] If the stipulated sum is made payable upon the breach of any of a number of conditions of varying importance, the weight of authority is that the sum will be held a penalty.[10] But the modern English rule is to consider such a situation mere prima facie evidence of intent to provide a penalty.[11] In case of doubt the courts are inclined to hold the sum a penalty.[12]

While probably actual damage is always considered by the court in construing the intent of the parties, it is unsettled whether actual damage needs to be proved.[13] While apparently this is not required by the weight of authority, yet it would seem to be more consonant with principle to require such proof, for since the principle of granting damages is to award just compensation,[14] the court should be permitted to examine the particular circumstances accompanying the actual breach.[15]

This question was directly considered in California for the first time in *Vath v. Hallett*,[16] where liquidated damages were expressly

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[5] Dunlop Tyre Co. v. New Garage Co., supra, n. 1; Poque v. Kaweah Co. (1903), 138 Cal. 664, 72 Pac. 144.

[6] Muldoon v. Lynch, supra, n. 1; Myer v. Hart, supra, n. 3; Dunlop Tyre Co. v. New Garage Co., supra, n. 1.

[7] Dunlop Tyre Co. v. New Garage Co., Supra, n. 1; 1 Sedgwick Damages, (9th ed.), § 406.

[8] Cal. Steam Nav. Co. v. Wright (1856), 6 Cal. 258, 65 Am. Dec. 511; Clark v. Barnard (1882), 108 U. S. 436, 27 L. Ed. 780, 2 Sup. Ct. Rep. 878.

[9] Cal. Civ. Code, §§ 1670, 1671; Pac. Factor Co. v. Adler (1891), 90 Cal. 110, 27 Pac. 36; Potter v. Ahrens (1896), 110 Cal. 674, 43 Pac. 388; Long Beach etc. v. Dodge (1902), 135 Cal. 401, 67 Pac. 499.

[10] Chicago Wrecking Co. v. United States (1901), 45 C. C. A. 343, 106 Fed. 385; Camor v. Watts (1885), 115 U. S. 353, 29 L. Ed. 406, 6 Sup. Ct. Rep. 91; Wallis v. Smith (1882), L. R. 21 Ch. Div. 243.

[11] Pye v. British Auto Syndicate (1906), L. R. (1906), 1 K. B. 425; Dunlop Tyre Co. v. New Garage Co., supra, n. 1.

[12] People v. C. P. R. R. (1888), 76 Cal. 29, 18 Pac. 90; Davies v. Penton (1827), 6 B. & C. 216, 108 Eng. Rep. Repr. 433.

[13] Clement v. Railroad Co. (1890), 132 Pa. 445, 19 Atl. 274, 276; Kelso v. Reid (1892), 145 Pa. 606, 23 Atl. 323, 27 Am. St. Rep. 716; McCann v. City of Albany (1899), 158 N. Y. 634, 53 N. E. 673; Hathaway v. Lynn (1889), 75 Wisc. 186, 43 N. W. 956, 6 L. R. A. 551; Clydebank Engineering Co. v. Don Jose Ramos etc. (1904), L. R. (1905) A. C. 6.

[14] Myer v. Hart, supra, n. 3; Muldoon v. Lynch, supra, n. 1.

[15] Hahn v. Horstman (1876), 75 Ky. 249; Colwell v. Foulks (1868), 36 How. Pr. (N. Y.) 306.

[16] (Aug. 25, 1916), 23 Cal. App. Dec. 283.

stipulated for in case of the breach of an agreement to buy from the plaintiff all liquor and supplies for a period of six years. On demurrer two reasons were stated for denying liquidated damages: first, that the same sum was fixed in the event of the breach of any of a number of stipulations of varying importance. This seems to follow the weight of authority as well as an earlier California case.[17] The second point was that no substantial damage had been shown, although no prior California decision has even suggested this as a prerequisite to the recovery of liquidated damages.[18] The view of the court, however, seems to mark an advance toward the true principle of damages; that is, to award just compensation.

J. B. W.

ELECTIONS: CANDIDATE'S RIGHT TO WITHDRAW.—In *Bordwell v. Williams*[1] it was decided that a candidate may withdraw and have his name left off the primary ballot after he has been regularly certified to the various county clerks and registrars as a candidate for the Republican nomination for United States senator.

There is some reason in the proposition that the party public have a certain interest in prohibiting a candidate from deserting the field after the expiration of the time allowed for qualifying as a candidate entitled to have his name placed on the primary ballot. But the principal case appears sound. A citizen is not required to seek election to office and in the absence of a contrary statutory provision the mere fact that he has announced his candidacy should not preclude him from withdrawing whenever he desires to do so. The legislature has provided that before any elector may have his name put on the primary ballot, he must sign an affidavit stating that if nominated he will accept such nomination and not withdraw.[2] This would seem to indicate that a withdrawal before nomination at the primary election was contemplated by the legislature.[3]

The question of a candidate's right of withdrawal after nomination at the primary election presents greater difficulty. Although there is no adjudicated case in point in California, there are two cases under statutes similar to our own which came to opposite conclusions. One theory is that the affidavit not to withdraw after nomination at the primary election is only to insure good faith and that a person would hardly be required to swear not to do a thing which he could not do.[4] The other theory is that the legislature

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[17] People v. C. P. R. R., supra, n. 12; Dunlop Tyre Co. v. New Garage Co., supra, n. 1.

[18] There are conflicting dicta on the question. See Muldoon v. Lynch, supra, n. 1; Eva v. McMahon (1888), 77 Cal. 467, 472, 19 Pac. 872; Potter v. Ahrens, supra, n. 9; Nakagawa v. Okomoto, supra, n. 4.

[1] (Aug. 18, 1916), 52 Cal. Dec. 267, 159 Pac. 869.

[2] Cal. Stats. 1913, p. 1389.

[3] State v. Brodigan (1914), 37 Nev. 458, 142 Pac. 520.

[4] Elswick v. Ratliff (1915), 166 Ky. 149, 179 S. W. 11.